Supreme Court, U.S.
FILED
MAY 17 1991
OFFICE OF THE CLERK

No. 90-1703

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

EUGENIE PARNAR,

Petitioner,

v.

GREEN, NING, LILLY & JONES,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FROM THE JUDGMENT OF THE HAWAII SUPREME COURT

KE-CHING NING*
MICHAEL A. LILLY
GREEN, NING, LILLY & JONES
Suite 700, Ocean View Center
707 Richards Street
Honolulu, Hawaii 96813
(808) 528-1100

**Counsel of Record*

Attorneys for Respondent

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Hawaii Supreme Court decision is inconsistent with any ruling of this Court under the Seventh Amendment, when the Seventh Amendment has no binding effect on the states.

2. Whether the Hawaii Supreme Court decision is based on adequate state grounds, including the tardiness and limited scope of Petitioner's jury demand.

3. Whether this Court should exercise jurisdiction to review an unpublished memorandum decision which has no precedential value or general importance.

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
A. Findings of the Trial Court as Affirmed by the Hawaii Supreme Court	1
B. Post-Trial History	6
REASONS FOR DENYING THE WRIT	8
I. THERE IS NO SIGNIFICANT FEDERAL ISSUE UPON WHICH THIS COURT SHOULD TAKE JURISDICTION	8
A. Petitioner Failed to Present a Federal Issue Below; The Hawaii Supreme Court Has Not Passed on a Federal Issue; There Are Adequate State Grounds For Its Decision	8
B. There Is No Federal Question At All Because the Seventh Amendment Does Not Bind the Hawaii Courts	10
C. The Hawaii Supreme Court Decision is an Unpublished Memorandum Decision, Applies Only to the Parties, and Has No Precedential Effect	11
II. THE HAWAII SUPREME COURT FAIRLY AND CORRECTLY DENIED JURY TRIAL; A LIEN PROCEEDING IS EQUITABLE AND NOT TRIABLE TO A JURY; THIS HOLDING IS NOT IN CONFLICT WITH ANY CASE FROM THIS COURT	12
CONCLUSION	20

TABLE OF AUTHORITIES

Cases	Page
Boline v. Doty, 345 N.W.2d 285 (Minn. App.) (1984)	15
Carroll v. Miyashiro, 50 Haw. 413, 441 P.2d 638 (1968)	13
Doe v. Roe, 5 Haw. App. 558, 705 P.2d 535 (1985)	13
Frazee v. Frazee, 104 Idaho 463, 660 P.2d 928 (1983)	15
Harada v. Burns, 50 Haw. 528, 445 P.2d 376 (1968)	10
Honolulu S&L v. Ing, 40 Haw. 269 (1953)	13
In re Marriage of Rosenberg, 690 P.2d 1293 (Colo. App. 1984)	15
In re Rosenman & Colin, 850 F.2d 57 (2d Cir. 1988)	16
Jarman v. Hale, 112 Idaho 270, 731 P.2d 813 (Idaho App. 1986)	18
Keating v. Keating, 43 Haw. 51 (1958)	13
Kleager v. Schaneman, 212 Neb. 333, 322 N.W. 659 (1982)	15
Litman v. Fine, Jacobson, 517 So.2d 88 (Fla. App. 1987)	16
Lum v. Sun, 70 Haw. 288, 769 P.2d 1091 (1989)	10
Lynumn v. Illinois, 372 U.S. 528 (1963)	9
Makani Dev. Co. Ltd. v. Stahl, 4 Haw. App. 542, 670 P.2d 1284 (1983)	13
Skelton v. Spencer, 102 Idaho 69, 625 P.2d 1072 (1981)	13,19
Simler v. Conner, 372 U.S. 221 (1963)	16,18
Street v. New York, 394 U.S. 576, (1969)	9

Table of Authorities Continued

	Page
Tuinei v. City & County, 2 Haw. App. 574, 636 P.2d 363 (1981)	13
Village of New Brighton v. Jamison, 278 N.W.2d 321 (Minn. 1979)	15
Viveiros v. State, 54 Haw. 611, 513 P.2d 487 (1973)	10
United States Constitution	
Seventh Amendment	7,10
Statutes and Rules of Court	
Supreme Court Rule 14	8
Hawaii Rules of Appellate Procedure, Rule 35	12
Hawaii Revised Statutes §607-5(29)	13
Other Authority	
Stern, Gressman & Shapiro, *Supreme Court Practice*, (6th ed. 1986)	9,11

STATEMENT OF FACTS

A. Findings of the Trial Court as Affirmed by the Hawaii Supreme Court

The following is a summary of the trial court's Findings of Fact and Conclusions of Law dated September 13, 1989 (Appendix A), and is a quotation of the Statement of Facts in Respondent's Opening Brief in the Hawaii Supreme Court appeal. The findings are supported by substantial evidence from the trial record, references to which are shown in parentheses.

Petitioner's original lawsuit was against her employer for wrongful termination. Before coming to Respondent, Green, Ning, Lilly & Jones, she had been represented by three previous sets of lawyers. She had made a contingency fee agreement with each of them. They were: Boyce Brown (Tr. July 12, 1989, p. 64), Susan Ichinose (*Id.* p. 65), and David Schutter (*Id.* pp. 69-70). Each of the three fee agreements called for a one-third contingency fee. The agreement with Mr. Brown escalated to 40% on retrial; the agreement with Mr. Schutter called, in addition, for an escalation to 45% in case of remand after an appeal (*Id.* pp. 73-74). Mr. Schutter's agreement also authorized him to accept any settlement at or over $200,000.00 (*Id.* p. 76).

Trial of the wrongful termination case was scheduled to commence in January, 1987. Settlement negotiations shortly before trial yielded an offer from the defendants of $115,000.00 (*Id.* p. 78). Mr. Ferrera, of the Schutter office, testified that Petitioner authorized a settlement at $125,000.00 (Tr. July 13, 1989, p. 70). This was confirmed by Petitioner (Tr. July 12, 1989, p. 81). When defendants would not agree to the higher number, Petitioner's attorneys offered to

reduce their fees so that she would net the amount she wanted. Nevertheless, she refused to settle (Tr. July 13, 1989, p. 51).

Mr. Schutter then moved before Judge Waldorf, the settlement and trial judge, to have Petitioner declared incompetent, so a guardian could be appointed to settle for her (Tr. July 12, 1989, p. 110). She began to look for another lawyer. On Thursday, January 29, Judge Waldorf allowed her 24 hours to obtain new counsel (Tr. July 6, 1989 p. 20). At this time, trial was scheduled to commence the following week (*Id.* p. 26).

Petitioner's long-time friend, Larry Zenker, also an attorney, recommended Michael Lilly (Tr. July 7, 1989, pp. 24, 47). She spoke with Mr. Lilly on Thursday, and made an appointment to meet with him on Friday morning (Tr. July 6, 1989, p. 20). They met for about an hour, and orally agreed that Mr. Lilly would represent her in the upcoming trial on a contingency fee basis that was later reduced to writing (Tr. July 6, 1989, pp. 24-5). She showed that she was "a woman who had a very clear grasp of the facts in her case, a very competent woman, determined woman" (*Id.* p. 24). That afternoon, Mr. Lilly entered an appearance for her, and obtained a continuance of the trial to mid-April (*Id.* pp. 31-2). Also on that day, Judge Waldorf denied Mr. Schutter's motion to find Petitioner incompetent (*Id.* p. 111).

On Monday, February 2, Petitioner and Mr. Lilly met again. Mr. Lilly showed her a draft fee agreement, and went over every term with her (*Id.* pp. 104-105). When she indicated her understanding and agreement, he had it typed in final form, and she

signed it (*Id.* pp. 33-34). The agreement provides, in pertinent part:

> "You have requested the representation of our law firm in matters involving the termination of your employment with Americana Hotels, Inc. *This letter does not cover any other representation we may undertake on your behalf.*"

(emphasis added) The letter provided for a one-third contingent fee "up to and through trial, and a fee of 40% after a notice of appeal is filed". It also provided that "*We will have a lien on all proceeds for our fees*" and "Should you at any time wish to terminate our services, you may do so; *however, we will be entitled to lien for our contingency fee on any amounts you collect during our representation of you or afterward*" (Respondent's Exhibit 3. Tr. July 6, 1989, p. 34).

In connection with Petitioner's desire to sue Mr. Schutter for malpractice, Mr. Lilly made clear to her that he would not represent her in such an action (Tr. July 6, 1989, pp. 41-2).

Before she signed the fee agreement, Petitioner had been given names of other lawyers by Mr. Zenker. She was free to retain another attorney, and she had telephoned at least one (Tr. July 7, 1989, pp. 35-36; Tr. July 12, 1989, pp. 84, 93).

Respondent took the case on a contingency despite the risks of a total loss or low recovery, and despite the recommendation by Mr. Schutter that Petitioner accept the settlement offer of $115,000. The novel nature of the case made it a high-risk case (Tr. July 6, 1989 pp. 101-02).

Mr. Lilly tried the case and obtained a verdict in April, 1987, of $2,070,000.00. This was and is the highest award for such a case in Hawaii; Petitioner was "ecstatic" at the result (*Id.* p. 59).

The defendants then appealed that verdict to the Hawaii Supreme Court (*Id.* p. 58). Respondent represented Petitioner through the entire appeal process until the Hawaii Supreme Court affirmed the verdict. Respondent then successfully defended the Defendants' Motion for Reconsideration before the Hawaii Supreme Court (*Id.* p. 68). Defendants then filed a petition for writ of certiorari of the punitive damages to the U.S. Supreme Court (*Id.* p. 69). At that point, the portion of the verdict which was not affected by the stay pending the U.S. Supreme Court appeal was placed in Respondent's trust account (*Id.* p. 70).

On November 8, 1988, despite having achieved a total victory through Respondent's efforts, Petitioner terminated Respondent's services and refused to pay them a penny for their work, not even their out-of-pocket expenses paid on her behalf (Tr. April 24, 1989, p. 7). Her termination letter gave no reason for her action (Tr. July 6, 1989, p. 78). But for the letter, Respondent would have continued with her case to its conclusion at the U.S. Supreme Court (*Id.* pp. 79-80).

During the nearly two years that Respondent worked for her, Petitioner never questioned her fee agreement, except for one inquiry about whether a step up to 40% was reasonable merely on the filing of a notice of appeal (*Id.* p. 63). In order to meet her concern, Mr. Lilly drafted an amendment to the fee agreement to provide for a graduated scale, in-

creasing until the work on the appeal was done. Petitioner never returned the document, and cancelled the meeting set to discuss it; thus, the fee agreement was never amended (*Id.* pp. 63-64). In fact, Respondent had to defend the whole appeal to the end, as well as defeat the Motion for Reconsideration (*Id.* pp. 67-68, 71-72). Thus, the issue of whether the step up to 40% was earned became moot.

When no payment with respect to the outstanding fees was received after several months, Respondent finally filed a Motion for Partial Enforcement of Attorneys' Lien on April 13, 1989 (R. Vol. 12, 30-85).[1] Petitioner put up a vigorous defense. She asserted that she had signed the fee agreement under duress and that Respondent should have also sued and filed disciplinary charges against Mr. Schutter and filed disciplinary charges against Judge Waldorf, both of whom had urged her to settle her case. However, she made no counterclaim and she called no experts on the reasonableness of the fee.

Petitioner's various assertions were contradicted by the specific disclaimer in the fee agreement of any representation other than the wrongful termination suit. Her primary position that she had been duped into the fee agreement was fabricated after the fact to evade liability: she waited nearly two years, and only after she received all the benefits of Respondent's work to raise that defense. Her claim that the law firm should be paid only $30,000.00, as fair value for its work, (Tr. July 13, 1989, p. 37) is undermined by the fact that she, in fact, paid $53,333.00 plus costs

[1] The hearing was had before the same judge who presided over the original wrongful termination suit.

to Mr. Schutter to settle his lien against her (that being one-third plus costs of the $115,000 settlement offer that Mr. Schutter had obtained for her) (*Id.* pp. 36-38). She made that agreement even though he had performed *no* trial work *or* appellate work whatsoever and had not obtained a judgment in her favor.

At the end of a five-day trial, on evidence that was largely uncontradicted, the court concluded that: (1) Petitioner was not under any duress when she made her agreement with Respondent; (2) her objections to the fees were neither credible nor meritorious; (3) there was *no* agreement that Respondent pursue Mr. Schutter or anyone else; and (4) expert testimony showed that the fees charged were fair, reasonable and well within community norms.

B. Post-Trial History

During the trial of Respondent's lien, Petitioner was represented by attorneys John Chanin and Keith Yamada. Philip Bogetto, and Peter Esser and Willard Peterson also entered appearances as additional co-counsel. Since the Supreme Court judgment, she has, in addition, hired Ephraim Margolin of California. He is the eighth lot of lawyers to represent her. Among the eight, she has contested the fees of the third (Schutter), fourth (Respondent) and also the fifth, John Chanin. (Mr. Chanin has filed a lawsuit and notice of lien on the balance of the funds now held in court. *See* Appendix B).

Petitioner appealed to the Hawaii Supreme Court. On appeal, she asserted the trial court erred in: "(1) determining it had jurisdiction to award attorneys' fees; (2) denying the request for a jury trial; (3) awarding the attorneys' fees according to the contin-

gency fee contract, when it was obtained under duress or fraud, terms were unexplained, or the fee was out of proportion to the value of services rendered; (5) [sic] awarding the fees according to the contingency fee contract when the client discharged the attorney before the end of litigation; and (6) [sic] finding, in the alternative, the fee was reasonable under quantum meruit." (Hawaii Supreme Court memorandum opinion at 2.)

As to the jury issue, Petitioner's brief (Section VIB of which is attached hereto as Appendix C) first conceded that the federal Seventh Amendment did not apply, and then argued the issue under the State Constitution.[2]

On January 9, 1991, the Supreme Court issued its unpublished memorandum decision. Without specification, the decision rejected all of Petitioner's arguments, and affirmed the judgment in its entirety.[3]

---

[2] Her brief stated: "*The U.S. Supreme Court has ruled, however, that the Seventh Amendment "does not in any manner whatever govern or regulate trials by jury in state courts."* [citations]. . . . This Court has ruled that, "*[w]e then must turn to the state constitutional provision and the statutes and rules implementing it" to determine when the right to jury trial attaches in a civil case.*" (Petitioner's Opening Brief at 20, emphasis added). The brief then proceeds to cite the Hawaii Constitution.

[3] After a statement of facts, the Hawaii Supreme Court opinion consisted, in its entirety, of the following: "After a careful review of the record, we conclude that the trial court did not err in enforcing the fee agreement. We further conclude that, the trial court did not err in finding the fees requested by Respondent to be reasonable. As to the other grounds asserted by Petitioner and by Respondent on their cross-appeal, we find no reversible error. Affirmed."

Judgment pursuant to the memorandum decision was filed on January 31, 1991.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO SIGNIFICANT FEDERAL ISSUE UPON WHICH THIS COURT COULD TAKE JURISDICTION

A. Petitioner Failed to Present a Federal Issue Below; The Hawaii Supreme Court Has Not Passed on a Federal Issue; There Are Adequate State Grounds For Its Decision

Supreme Court Rule 14.1(h) requires that:

> "the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner or raising them and the way in which they were passed upon by those courts; and such pertinent quotation. . . as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari."

Petitioner has not made this showing. The above citation of the record shows that, on the contrary, Petitioner failed to raise the federal issue before the Hawaii Supreme Court. Rather, she conceded the lack of a federal issue, and elected to proceed under state constitutional grounds.

Moreover, the memorandum opinion makes no reference, explicitly or implicitly, to the jury issue. The grounds for the Hawaii Supreme Court decision is therefore unclear. When "the highest state court has

failed to pass upon a federal question, *it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.*" *Street v. New York*, 394 U.S. 576, 582 (1969) (emphasis added). Under such circumstances,

> "[t]here must be some affirmative showing that a federal question was presented to the state court and that a decision on such question was *necessary* to a determination of the cause. *When this principle is not clearly satisfied, especially because of the presence of an adequate state ground, jurisdiction will be declined [citations]. To overcome that presumption, the party seeking review 'must demonstrate that neither of the state grounds can account for the decision below.' Durley v. Mayo*, 351 U.S. 277, 281 (1956)."

Stern, Gressman & Shapiro, *Supreme Court Practice* (6th ed. 1986) [hereafter "Stern"] (emphasis added).

Petitioner may make this demonstration by obtaining a certificate from the court appealed from, showing that the federal question was raised and decided. The duty to obtain such a certificate is on "counsel for the *petitioner*". *Lynumn v. Illinois*, 372 U.S. 528, 535-36 (1963). Petitioner has made no such effort in this case.

On the contrary, there were adequate state grounds on which the Hawaii Supreme Court could have ruled against Petitioner. These included the argument (see Part III below) that Petitioner failed to demand jury trial timely. Similarly, Respondent argued (see Part III below) that due to the narrow scope of Petitioner's

jury demand, the lack of jury trial was at most harmless error, because after the court issues were determined, no jury issue remained.

Petitioner has failed to show that a federal question was presented, or that it was necessary to the Hawaii Supreme Court decision. Jurisdiction by this Court should be declined.

B. There Is No Federal Question At All Because the Seventh Amendment Does not Bind the Hawaii Courts

Petitioner acknowledges that the Seventh Amendment has no applicability to the states. She asserts, however, that the Hawaii Supreme Court has made it "binding" in Hawaii, thereby turning every jury issue under the Hawaii state constitution into a federal question.

This is not the law.

Hawaii Supreme Court cases have consistently held that "[t]he Seventh Amendment jury trial requirement is not binding upon the states." *Harada v. Burns*, 50 Haw. 528, 532, 445 P.2d 376, 380 (1968). *Accord Viveiros v. State*, 54 Haw. 611, 618, 513 P.2d 487 (1973) ["State courts, on the other hand, are not bound by the same constitutional constraints, since the Seventh Amendment is not binding upon them."] (Levinson & Kobayashi, JJ. concur. & dis.); *Lum v. Sun*, 70 Haw. 288, 294, 769 P.2d 1091 (1989) ["[T]he Seventh Amendment, [however], applies only to proceedings in courts of the United States and does not in any manner whatever govern or regulate trials by jury in state courts. . . ." (citation omitted).''].

Petitioner misperceives Hawaii law when she asserts, contrary to these clear holdings, that Hawaii courts have made the Seventh Amendment "binding" on themselves.

C. The Hawaii Supreme Court Decision is an Unpublished Memorandum Decision, Applies Only to the Parties, and Has No Precedential Effect

> "The importance of the issues involved in the case as to which review is sought is of major significance in determining whether the writ of certiorari will issue. The Court does not have time to give full consideration to all cases which present novel or interesting issues. It must necessarily confine itself to those which reflect the more important legal problems within the realm of its jurisdiction. And the problem, though intrinsically important, must be *"beyond the academic or the episodic." Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955)."
>
> *****
>
> *"[T]he importance of a case depends on how many other persons, apart from the actual litigant, will be affected by the questions presented."*
>
> *****
>
> "An issue the Court deems of interest and importance *only to the immediate parties to the case* is not likely to qualify as worthy of further consideration."

Stern at 212, 213, 374 (emphasis added).

The Hawaii Supreme Court opinion is a *memorandum* decision. A memorandum decision is not published, cannot be cited, and has no precedential value.

Haw. Rules App. Pro. 35.[4] By definition, it affects and "is of interest and importance only to the immediate parties", and can present no issue that qualifies as "important" for certiorari.

II.

THE HAWAII SUPREME COURT FAIRLY AND CORRECTLY DENIED JURY TRIAL; A LIEN PROCEEDING IS EQUITABLE AND NOT TRIABLE TO A JURY; THIS HOLDING IS NOT IN CONFLICT WITH ANY CASE FROM THIS COURT

In Petitioner's Motion for Jury Determination, the *sole* issue upon which she demanded a jury trial was as follows:

> the issue of *what constitutes a reasonable and proper attorney's fee*, if any, which is payable by plaintiff Eugenie Parnar to the law firm of Green, Ning, Lilly & Jones. (emphasis added)

(R. Vol. 13 at 4). Petitioner filed no counterclaim and thus, had no right to demand a jury based on any counterclaim.

---

[4] Rule 35. Opinions.

(a) Classes of Opinions. Opinions may be rendered by a designated judge or justice, or may take the form of per curiam or memorandum opinions.

(b) Publication. Memorandum opinions shall not be published.

(c) Citation. A memorandum opinion shall be not cited in any other action or proceeding except when the opinions establishes the law of the pending case, res judicata or collateral estoppel, or in a criminal action or proceeding involving the same respondent.

Petitioner's jury demand was untimely. It was filed May 25, 1989, (R. Vol. 13 at 1-7) more than 10 days after her Opposition, filed on April 21, 1989 (R. Vol. 12 at 90-111). Therefore, the jury demand did *not* comply with Rule 38 or Haw. Rev. Stat. § 607-5(29), and was therefore untimely.

Thus, Petitioner filed her jury demand too late. Even then she did not seek a jury trial on the issue of Respondent's *entitlement* to the fee, that is, the validity of the contract—the liability issue on which she rested her whole defense—she *only* sought it on the *amount* of the fee.

Petitioner argues that she should have had a jury, yet in *none* of the Hawaii cases involving attorney lien proceedings, did any party have a jury trial. *See Keating v. Keating*, 43 Haw. 51 (1958); *Tuinei v. City & County*, 2 Haw. App. 574, 636 P.2d, 363 (1981); *Makani Dev. Co. Ltd. v. Stahl*, 4 Haw. App. 542, 670 P.2d 1284 (1983); *Carroll v. Miyashiro*, 50 Haw. 413, 441 P.2d. 638 (1968). While those cases do not expressly discuss the jury issue, they are consistent with numerous authorities from other jurisdictions which hold *against* such entitlement. This is because lien enforcement proceedings are not "suits at common law" subject to jury trial. *See Doe v. Roe*, 5 Haw. App. 558, 565, 705 P.2d 535 (1985) ["Both [federal and state] constitutions reserve the right to a jury "[i]n suits at common law" " a paternity suit is not a suit at common law]; *Honolulu S&L v. Ing*, 40 Haw. 269 (1953) [mortgage foreclosure is not a suit at common law].

Thus, in the leading case of *Skelton v. Spencer*, 102 Idaho 69, 625 P.2d 1072 (1981), the court reasoned as follows:

The appellant raises another objection to the procedure followed below; that she was denied a right to a jury trial. *The assertion and enforcement of attorney's liens is an equitable exercise.* This court recognized the equitable nature of the lien in *Nancy Lee Mines, Inc. v. Harrison*, 93 Idaho 652, 654-5 (n.4), 472 P.2d 39, 41-2 (1970). See also, 7 Am. Jur. 2d §346 (1980). As such an equitable procedure, it is generally held that *these causes are triable to the court. Speiser, supra,* at § 16.36, p. 400 ("*[t]here is no right to a jury trial in the proceeding.*"). In response to the same demand for jury, the Missouri appellate court stated in *Fein v. Schwartz*, 404 S.W.2d 210 (Mo. App. 166):

> *The attorney's lien, whether under the statute or at common law, is equitable in its nature.* Even decisions in this country, which confine its existence and application to the narrowest limits, always speak of it as an equitable lien, right or privilege. . . But where the thing is not in possession [i.e., is not a retaining lien], and some affirmative action is required by the attorney, he like other lien claimants, must seek relief in equity . . . There is no question but that a proceeding such as this one is an equitable one, in that it is triable before a court of equity.
>
> *The instant suit is one in equity in which a trial by jury did not exist at common law and never has as a matter*

> *of right in this state.* 404 S.W.2d at 228. (emphasis added)

Id. at 1079; *accord Frazee v. Frazee*, 104 Idaho 463, 660 P.2d 928, 931 (1983); *Boline v. Doty*, 345 N.W.2d 285 (Minn. App. 1984); *Village of New Brighton v. Jamison*, 278 N.W.2d 321 (Minn. 1979); *see also Kleager v. Schaneman*, 212 Neb. 333, 322 N.W. 659, 662-63 (1982) ["The proper method for enforcing an attorney's charging lien is by resort to equity, because such a lien is equitable in nature [citation omitted]. The pleadings in the present action joined issue on the question of whether the plaintiff preserved a legitimate attorney's lien upon which he could 'foreclose.' Therefore, it was an equitable action in which the defendant was not entitled to a jury trial."]

> A proceeding initiated to establish an attorney's lien, as in this case, is equitable in nature, *Fillmore v. Wells*, 10 Colo. 228, 15 P.343 (1887), and *there is no right to a jury trial in such actions. Miller v. District Court*, 154 Colo. 125, 388 P.2d 763 (1964). Appellant's counterclaim for breach of contract did not change the nature of the action. *See In re Trust of Malone*, 658 P.2d 284 (Colo. App. 1982). *Therefore, the court did not err in denying the jury request.* (emphasis added)

In re Marriage of Rosenberg, 690 P.2d 1293, 1294-95. (Colo. App. 1984) 1294-95.

The cases cited by Petitioner discuss the proposition of whether or not a party is entitled to a jury trial in an *independent* action for attorney's fees. That proposition is immaterial to this case because

Respondent properly chose, under Hawaii state procedure, to file a motion to enforce lien *in the underlying action*, where Petitioner is clearly *not* entitled to a jury trial. *See Litman v. Fine, Jacobson*, 517 So.2d 88 (Fla. App. 1987). In that case, the court held that an attorney has merely to assert a claim of lien in the main case to become entitled to a determination "by the court, sitting without a jury, of the amount of attorney's fees due." *Id.* at 93.

> However, if an attorney has *not* claimed a charging lien or there are no proceeds to which a lien can attach, he nonetheless retains the right to sue the client on the contract *in an action at law* in which the client is entitled to a jury trial. (emphasis added)

Id. at note 7.

Nor is there existence of "joint" legal and equitable issues. In *In re Rosenman & Colin*, 850 F.2d 57 (2d Cir. 1988), the court disposed of Petitioner's argument that the proceeding was "really" a contract dispute, and held that lien enforcement proceedings are "inherently equitable" notwithstanding the existence of traditional legal issues. It also expressly distinguished *Simler v. Conner*, 372 U.S. 221 (1963), chiefly relied on by Petitioner to show a conflict between the Hawaii Supreme Court decision and this Court's for the reason that *Simler* was a declaratory judgment action, not an equitable lien enforcement action:

> *In the context of both attorneys' liens and other liens, such actions have repeatedly been regarded as equitable in nature so that no jury right attaches. See Damsky v. Zavatt,*

289 F.2d 46, 53 (2d Cir. 1961) (tax lien); *Walter E. Heller & Co. v. O/S Sonny V*, 595 F.2d 968, 976 n.7 (5th Cir. 1979) (mortgage foreclosure); *In re King*, 168 N.Y. 53, 58-59, 60 N.E. 1054, 1056 (1901) (attorney's lien); *Flores v. Barricella*, 123 A.D.2d 600, 600, 506 N.Y.S.2d 885, 886 (2d Dep't 1986) (attorney's lien); *In Re Britton's Will*, 187 Misc. 70, 60 N.Y.S.2d 466, 474 (Monroe Cty. Surr. Ct. 1946) (attorney's lien).

Simler v. Conner, 372 U.S. 221, 83 S.Ct. 609, 9 L.Ed.2d 691 (1963), *on which Richard relies, is not to the contrary. In that case, the Supreme Court held that the plaintiff was entitled to a jury in a declaratory judgment action he brought to determine the extent of his liability to an attorney under a retainer agreement. Simler followed the long-settled rule that declaratory judgment actions are inherently neither equitable nor legal and that the nature of the underlying dispute determines whether a jury trial is available. See Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 79 S.Ct, 948, 3 L.Ed.2d 988 (1959); *(American) Lumbermens Mutual Casualty Co. v. Timms & Howard, Inc.*, 108 F.2d 47, 499 (2d Cir. 1979); *Owens-Illinois, Inc. v. Lake Shore Land Co., Inc.*, 610 F.2d 1185, 1189 (3d Cir. 1979); Fed. R. Civ. P. 57, 5 *Moore's Federal Practice*, para. 38.29 at 38-230 (2d ed. 1987). *In contrast to declaratory judgment actions, proceedings to enforce a lien are inherently equitable. No jury is available notwithstanding that traditionally legal issues*

> *are raised, such as the contractual liability giving rise to the lien. See Damsky v. Zavatt, supra,* 289 F.2d at 53; *Walter E. Heller & Co. v. O/S Sonny V, supra,* 595 F.2d at 976 n.7; *Roselle v. Connecticut General Life Insurance Co.*, 471 F.2d 29, 31 (10th Cir. 1972), *cert. denied*, 411 U.S. 921, 93 S.Ct. 1549, 36 L.Ed.2d 314 (1973).

Id. at 574-75 (emphasis added).

Simler v. Conner is not "stunningly similar" as Petitioner asserts, but easily distinguished.

Petitioner cites *Jarman v. Hale*, 112 Idaho 270, 731 P.2d 813 (Idaho App. 1986). That case did *not* involve a contingent fee agreement, and apparently no written agreement at all.[5] The attorney filed a complaint for his fees earned during representation of the client in a civil rights case, and to enforce lien. The client counterclaimed in malpractice. The court held that

> The record before us presents a factual dispute over *terms of the parties' agreement as to fees and as to whether fees have been earned and properly billed.* The Hales are entitled to have these disputed issues of fact determined by a jury. However, separate issues are posed by a charging lien of an attorney that is equitable in nature and triable to the court, *Frazee v. Frazee*, 104 Idaho 463, 660

---

[5] "*If* there is an amount of fees and costs due from the Hales under a contract then that contract amount will determine the amount of the lien. If the trier of the facts determines there was no contract fixing fees, Jarman may nevertheless be entitled to recover under a quantum meruit theory." *Id.* at 818 (emphasis added).

> P.2d 928 (1983). *The court and not a jury will determine the validity of the lien and the scope thereof. Skelton v. Spencer, supra.* As noted earlier, the *amount* of any lien will be limited by the amount to be due from the client to the attorney. (emphasis added)

Id. at 818-19. The principal issues in that case were therefore whether a contract existed, its terms, and the amount of the fee, which was not a contingent fee. This, and not Petitioner's, reading, harmonizes the case with *Skelton v. Spencer*, 102 Idaho 69, 625 P.2d 1072 *supra.*

Petitioner filed no counterclaim for malpractice or for any other matter, or any independent suit. It was uncontroverted that a contract existed; its terms were acknowledged, and the percentage fee was clear. There was no dispute about the amount due under the contract because the terms were clear but Petitioner still demanded a jury trial on whether the fee was "reasonable." But of course, as the authorities cited show, that issue is reached only after the court determines that the written contract must be set aside for fraud and coercion, which the court refused to do.[6] Once the court determined that the contract should be enforced and not set aside, the jury issue of reasonableness was moot. It became moot because of the court's other rulings, i.e., if the contact is valid, enforceable, and complete on its face as the court found, a jury *would have been required* to come to the *same* conclusion as the court did on the *amount* of the fee, which was a simple percentage calculation.

---

[6] Parnar did not, in her jury demand, assert that the issue of setting aside the contract should go to a jury.

For that reason, after the court's findings of liability under the contract, *no jury issue remained.* Thus, at *most*, it was harmless error for the trial court to have denied Petitioner a jury trial on such an issue.

The Hawaii Supreme Court and the trial court correctly denied jury trial, or 1) failed to address the jury issue because the jury demand was untimely or 2) failed to address it as a federal question because it was never so presented. Consequently, there is no reversible error for this Court.

CONCLUSION

The Court should decline to exercise its discretionary jurisdiction because (1) there is no federal question; (2) Petitioner failed to present the asserted federal question to the state court; (3) there were adequate state grounds for the decision; (4) there is no issue of general importance because the memorandum decision sets no precedent and is limited to the parties; and (5) the Hawaii Supreme Court decision is consistent with cases from other jurisdictions, is not inconsistent with the law of this Court, and yielded a fair and correct result.

Respectfully submitted,

KE-CHING NING*
MICHAEL A. LILLY
GREEN, NING, LILLY & JONES
Suite 700, Ocean View Center
707 Richards Street
Honolulu, Hawaii 96813
(808) 528-1100

*Counsel of Record — *Attorneys for Respondent*

APPENDIX

APPENDIX A

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

EUGENIE PARNAR,

Plaintiff,

vs.

AMERICANA HOTELS, INC., FLAGSHIP INTERNATIONAL, INC., MARK E. LIQUORI, JOHN DOES 1-25, JANE DOES 1-25, DOE CORPORATIONS 1-25, DOE PARTNERSHIPS 1-25,

Defendants.

Of Counsel

BAYS, DEAVER, HIATT,
KAWACHIKA & LEZAK

JERRY M. HAITT 3116-0
CRYSTAL K. ROSE 3242-0
Ninth Floor, Hawaii Tower
745 Forth Street
Honolulu, Hawaii 96813
(P.O. Box 1760, Honolulu 96806)
Telephone: (808) 523-9611

Attorneys for Green, Ning, Lilly & Jones

CIVIL NO. 52878

FINDINGS OF FACT and CONCLUSIONS OF LAW

1ST CIRCUIT COURT STATE OF HAWAII
FILED

1989 SEP 13 P 4:16

N. ANAYA
CLERK

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On April 18, 1989, Movants Green, Ning, Lilly and Jones ("GNLJ") filed a Motion for Partial Enforcement of Attorneys' Lien. Plaintiff Eugenie Parnar ("Parnar") filed a Response and Request for Continuance on April 21, 1989. Both parties filed supplementary memoranda and affidavits and the hearing was originally set for April 24, 1989, was continued by the Court to July 6, 1989.

On July 3, 1989, GNLJ filed an Amended Motion for Partial Enforcement of Attorneys' Lien. There was no opposition to the Motion and on July 6, 1989, the parties stipulated in open Court to allow this Court to determine the entire amount of attorneys' fees and costs due GNLJ.

At the same time, the parties also stipulated that all witnesses listed by both Parnar and GNLJ would be allowed to testify. As a result, Parnar withdrew her Motion to Strike Michael A. Lilly and GNLJ's Statement of Issues and Witnesses Regarding Motion for Partial Enforcement of Attorneys' Lien.

On July 6, 7, 11, 12, and 13, 1989, the Court heard testimony from Michael A. Lilly, Esq., Wayne D. Parsons, Esq., Richard J. Knowen, Esq. and Parnar, on behalf of GNLJ, and Larry L. Zenker, Esq., Charles J. Ferrera, Esq., and Parnar on behalf of Parnar. The Court qualified Wayne D. Parsons, Esq., as an expert on behalf of GNLJ. Parnar chose not to submit any expert testimony.

The Court also received numerous exhibits from both sides as reflected in the record. The court heard final arguments on July 13, 1989. After considering the documentary evidence, the testimony and credibility of the witnesses, and having considered the arguments of counsel, the Court hereby enters the following Findings of Fact, Conclusions of Law and Judgment:

FINDINGS OF FACT

1. In 1975, Parnar was fired from her job as a secretary with the Ala Moana American Hotel. In or about 1977, she filed suit against the Americana Hotels, Inc. and its parent company, Flagship International, Inc., for wrongful termination.

2. Parnar has more than a layman's knowledge of contingency fee agreements, having entered into the following three (3) such agreements before the one at issue in this case. No claim is being made herein for attorneys' fees due any previous attorney. However, previous fee agreements were as follows:

a. In or about 1977, Parnar entered into a oral contingency fee agreement with the law firm of Brown & Bettencourt, whereby they would be entitled to a 33.33% fee on any recovery in this case;

b. In 1981, Parnar terminated Brown & Bettencourt and hired Susan Ichinose ("Ichinose") to represent her. Parnar and Ichinose entered into a written contingency fee agreement whereby Ichinose would be entitled to a 33.33% fee on any recovery in this case;

c. In 1985, Parnar terminated Ichinose and hired David Schutter (and his associate Charles Ferrera) (hereinafter collectively "Schutter") to represent her. Parnar and Schutter entered into a written contingency fee agreement with the following relevant terms:

.i) contingency fees of 33.33% through trail, 40% after the filing of a notice of appeal, and 45% after remand to the lower court; and

ii) Schutter was given advance authority to settle the case for any sum in excess of $200,00 upon consultation with Parnar.

3. A controversy development between Schutter and Parnar on the eve of trial in January, 1987, the details

of which were testified to at length in this matter. As a result of that controversy, Parnar terminated her relationship with Schutter on January 30, 1987 and hired the law firm of GNLJ on a contingency fee basis. Lilly and Parnar discussed the contingency fee agreement orally on Thursday, January 29, 1987, Friday, January 30, 1987 and again on Monday, February 2, 1987. The terms of the contingency fee agreement ("Fee Agreement") were memorialized in writing on February 2, 1987. The principal terms of the Fee Agreement were as follows:

a. GNLJ would represent Parnar in the trial and potential appeal of her case against Defendants Americana Hotels, Inc. and Flagship International, Inc.;

b. GNLJ would receive a contingency fee of 33.33% through trial and 40% after the filing of a notice of appeal; and

c. GNLJ's contingency fee would not be offset by any attorneys' fees Parnar might owe to any of her prior attorneys in the case.

4. Parnar read and signed the Fee Agreement on Monday, February 2, 1987. The Fee Agreement is clear on its face. It is not ambiguous. It is fair and reasonable. It fully and completely memorializes the agreement reached between Parnar and GNLJ. The Court also finds that Parnar understood the terms of the Fee Agreement before she signed it.

5. No commitment was made by GNLJ to Parnar, or anyone else, to bring a malpractice or disciplinary action against Schutter or a disciplinary action against Judge Waldorf. The expressed terms of the Fee Agreement reflected the intent of the parties that GNLJ was hired to pursue only the case against the Americana Hotels, Inc. and Flagship International, Inc. GNLJ was not hired by Parnar to bring any other action against Schutter or Judge Waldorf. Moreover, GNLJ did not make any representa-

tions that they would undertake any such actions. Parnar did not have reasonable basis for believing that GNLJ intended to undertake any such actions.

6. GNLJ committed no fraud or misrepresentation to induce Parnar to enter into the Fee Agreement. Parnar was not under duress or undue influence from GNLJ when she entered into the Fee Agreement GNLJ. Parnar conceded in her testimony that GNLJ did not threaten, or intimidate her, in any way, that whatever emotional strain she may have been under was caused by Schutter and/or Judge Waldorf, and that her overriding feeling on February 2, 1987 was her gratitude to Lilly for "rescuing" her from what she considered to be a very difficult situation.

7. It is also clear from the evidence that Parnar did not sign the Fee Agreement until Monday, February 2, 1987, and that at that time, she already had obtained a continuance of the trial, already had found other counsel and had already prevailed on Schutter's Motion to have her declared incompetent because of her refusal to accept the Defendants' offer of $115,000, which Schutter had vigorously recommended. The Court finds that there is no basis to find that Parnar was under any duress or distress at the time she executed the Fee Agreement with GNLJ.

8. On January 30, 1987, and February 2, 1987, when GNLJ agreed to represent Parnar, there was a reasonable probability that the case would result in a total loss or a low recovery, thereby subjecting GNLJ to a substantial risk of receiving minimal or no fees for their work. According to the expert testimony from Mr. Parsons, wrongful termination cases were viewed by the profession, in general, at the time, as high risk cases since no "public policy" exception case had ever been tried in a Hawaii court before. According to Mr. Ferrera, he and Schutter had recommended settlement at $115,000, in part, because they both evaluated Parnar's possible wage loss recovery

at only $40,000 and because they did not believe that Parnar would be a good witness. GNLJ was uncertain how fully the case had been prepared for trial or how much further work would be necessary to try it. In addition, GNLJ was undertaking representation of a new client whose relationship with Schutter and Ferrera had terminated on the eve of trial under very controversial circumstances.

9. At the time Parnar entered into the Fee Agreement with GNLJ, Parnar represented to GNLJ that she would pay them pursuant to the Fee Agreement.

10. In reliance on both Parnar's representations and the Fee Agreement, GNLJ worked extensively on Parnar's case. Between January 30, 1987 and the start of trial on April 13, 1987, GNLJ obtained an extension of the trial date, prepared for trial, conducted additional discovery, filed various pre-trail motions, opposed motions filed by Defendants, prepared expert and lay witnesses, and became familiar with the record.

11. The Court notes that the evidence, including the testimony of Mr. Fererra, Mr. Lilly, Mr. Knowen and Mr. Parsons, confirmed that taking over Parnar's case shortly before trial, involved a tremendous amount of work by GNLJ.

12. After over a week of trial, the jury rendered the following jury verdict in favor of Parnar:

a. $1.5 million, for punitive damages;

b. $275,000, for emotional distress; and

c. $300,000, for lost income.

A judgment in the above amounts, providing for post-judgment interest t the legal rate, was entered on May 26, 1987.

13. Parnar obtained very substantial benefits from GNLJ's efforts. While Schutter had valued the case at

approximately $115,000 and Parnar herself had authorized settlement on one occasion at $125,000, GNLJ obtained a substantial verdict of $2,070,000—apparently the highest reported award for wringful termination in Hawaii.

14. The Court finds that before, during and after trial, Parnar made no mention of any objection to the Fee Agreement with GNLJ or to the payment of their fees pursuant to the Fee Agreement. The Court finds that GNLJ performed their part of the Fee Agreement in reliance on Parnar's promises to pay them the amount provided in the Fee Agreement.

15. In August 1987, Parnar did specifically ask GNLJ if they would bring a malpractice action against Schutter. GNLJ declined because, among other reasons:

a. GNLJ would likely be important witnesses for Parnar in any such action;

b. Canon 5 of the Code of Professional Responsibility would preclude them from representing her;

c. It was doubtful if there would be any damages available on such an action given the $2,075,000 jury verdict in her case; and

d. If she wanted to pursue such an action, it would be in her own best interest to be represented by an independent attorney on any such claim.

16. Not until August 1987, did Parnar raise any question about the Fee Agreement. At that time, Parnar was agreeable to paying the 33.33% contingency fee; however, she questioned increasing the contingency fee to 40% solely because a notice of appeal was filed. Parnar felt that the additional 6.6% was unreasonable if the case settled shortly after the filing of the notice of appeal if no work was done on the appeal. In response to Parnar's concern, GNLJ offered to amend the Fee Agreement to provide a sliding scale from 33.33% to 40% as the work was done on the

appeal. However, Parnar cancelled the appointment scheduled to discuss the matter with Mr. Lilly and never raised it again.

17. In August 1987, Parnar also raised the issue that she might want to amend the Fee Agreement to give her an option to terminate GNLJ and hire new counsel if her case were reversed after the appeal. Such an amendment was prepared and signed by GNLJ and mailed to Parnar, however, Parnar never executed or returned the amendment.

18. In any case, the evidence was uncontradicted, and the Court also finds, that both issues involving the Fee Agreement are moot since neither arose. First, the case did not settle pending appeal and all of the work on the appeal was completed, so that GNLJ earned the increase from 33.33% to 40%. Second, there was no remand and therefore, it was not necessary to hire counsel for a new trial.

19. On August 18, 1987, Defendants appealed the verdict. Briefs were researched, prepared and filed by GNLJ. Thereafter, GNLJ argued the case for Parnar before the Supreme Court of Hawaii, all without objection by Parnar and all in reliance on the terms of the Fee Agreement and the representations made by Parnar to GNLJ that they would be paid pursuant to the Fee Agreement.

20. On August 17, 1988, the Supreme Court rendered its Memorandum Opinion and affirmed the jury verdict in Parnar's favor. The Judgment on Appeal was entered on September 12, 1988. Thereafter, Defendants filed a Motion for Reconsideration, which GNLJ successfully opposed on behalf of Parnar. Defendants then moved for a stay of judgment pending review by the United States Supreme Court. GNLJ opposed the stay and the Court limited the stay to the issues and amounts involved int he punitive award of $1.5 million. The compensatory awards for lost income and emotional distress, together with the post-judg-

ment interest, were paid by Defendants to Parnar and placed in GNLJ's client trust account on September 29, 1988.

21. After his discharge, Schutter had filed a lien for his attorneys' fees. Following the successful verdict, as an accommodation to Parnar, GNLJ drafted a Motion to Vacate the Attorneys' Fees and Cost Lien filed by Schutter and gave it to Parnar to review and edit. However, because Schutter had threatened to sue Parnar for attorneys' fees of $300,000 on the basis of quantum meruit and because such an action would likely involve GNLJ as necessary witnesses for Parnar, GNLJ recommended that Parnar obtain independent counsel to advise her in the matter as well. Parnar did obtain separate counsel, John A. Chanin, Esq. The motion to vacate Schutter's lien was never filed. Instead, Parnar settled with Schutter for $53,333, $^1/_3$ of the last offer he obtained of $115,000, plus his costs.

22. On November 8, 1988, Parnar terminated GNLJ in a letter from Mr. Chanin. Parnar gave GNLJ no valid reasons whatsoever for the termination.

23. Based on all the evidence, the Court finds that Parnar's reason for terminating GNLJ was to avoid paying GNLJ under the Fee Agreement.

24. GNLJ was, until they were terminated, ready, willing and able to complete all further work on behalf of Parnar in this case, including the filing of an opposition to Defendants' expected Petition for Writ of Certiorari to the United States Supreme Court. Based on the evidence, the Court finds that GNLJ had already done the work on the issues for the appeal and post-appeal motions to the Hawaii Supreme Court. This research was made available to Parnar's new counsel, without condition, and even though GNLJ had no been paid.

25. On July 3, 1989, Defendant's Petition for Writ of Certiorari to the U.S. Supreme Court was denied and the

jury verdict in favor of Parnar is now due and owing in full.

26. On April 18, 1989, GNLJ filed their Motion for Partial Enforcement of Attorneys' Lien herein. On July 3, 1989, GNLJ filed their Amended Motion for Partial Enforcement of Attorneys' Lien. At the trial of the Lien, Parnar testified that she believed GNLJ was obligated to pursue a malpractice action against Schutter, and disciplinary action against Shutter, a disciplinary action against Judge Waldorf and to defend against Schutter's lien, all as a part of the Fee Agreement in this case. She believed these actions were warranted because of the pressure allegedly placed upon her to settle her case. GNLJ denied ever having been hired to pursue these matters or to do anything other than represent Parnar on her claims against the Defendants in this case.

27. Based upon the testimony, the various conflicts in the testimony and the demeanor of the witnesses, the Court finds that Parnar's memory and testimony are not reliable or credible as to these issues or any of the material disputed issues of fact. Parnar took several different and inconsistent positions with respect to authorization to settle the case at $125,000. It was confirmed by both Mr. Kowen and Mr. Ferrera that she did in fact authorize a settlement at $125,000.

28. Parnar's own testimony revealed her to be a person who capably and strongly resisted pressure by Schutter, Mr. Ferrera and Judge waldorf to settle the case, a person who argued persuasively with Schutter and with Judge Waldorf that she was competent and had a right to proceed to trial, a person who independently sought out the legal assistance of her attorney friend, Larry Zenker, when in need, and a person who ultimately dismissed Schutter because she was not satisfied with his services. Parnar is clearly a very strong-willed person who is capable of evaluating the circumstances she is in, making judgments about

them and acting in her own best interests. The Court finds that Parnar was not subjected to any duress, undue influence, or intimidation of any sort whatsoever in connection with the execution of the Fee Agreement with GNLJ.

29. The Court finds that under the Fee Agreement, Parnar was always free to discharge GNLJ but did not do so until the result of the case was virtually assured.

30. The Court finds that the actual costs incurred on behalf of Parnar by GNLJ before their discharge in this case was $8,938.69. The Court finds that this amount is reasonable and necessary. The Court disallows all other costs sought by GNLJ since they were incurred after their discharge.

CONCLUSIONS OF LAW

1. This Court, as the trial judge in Parnar's case in chief, has jurisdiction over this matter.

2. Under the Guidelines established in *Sharp v. Hui Wahine, Inc.*, 49 Haw. 241 (1966) and DR 2-106, this Court concludes that the Fee Agreement is neither illegal nor clearly excessive, but rather is fair and reasonable for the following reasons:

a. This was the first case tried which involved the public policy exception to the at-will doctrine to be tried in Hawaii, it was a novel and difficult case that would and did required GNLJ to expend a substantial amount of time and labor both at trial and on appeal.

b. From the testimonies of Wayne Parsons, Michael Lilly and Parnar, the Court concludes that all provisions of the Fee Agreement were well within the range of customary charges by attorneys in Hawaii for similar cases. Indeed, the Fee Agreement is more beneficial to Parnar than her agreement with Schutter because: it did not require a payment of 45% after remand to the lower court;

it did not authorize GNLJ to settle the case for over $200,000; and GNLJ's attorneys' fees were calculated on the net recovery after first deducting costs.

c. The amount in controversy in this case before trial was highly uncertain.

d. Parnar obtained substantial benefits from GNLJ's efforts.

e. GNLJ performed all contingencies contemplated under their fee agreement with Parnar.

f. The Court agrees with the testimony of GNLJ's expert that it is fair and reasonable and customary to provide no offset for fees owed to prior attorneys in taking a case under these circumstances.

g. The increase of fees from 33.33% to 40% upon the filing of a notice of appeal is fair and customary in Hawaii. The additional work and risk involved in handling an appeal justified the increase in the contingency fee to be paid.

3. At all times, GNLJ were ready, willing and able to complete all work connected with the case.

4. GNLJ neither committed any act nor omitted to perform any act justifying their termination. Their termination by Parnar was without reasonable, legitimate or just cause. GNLJ were not obligated, by agreement or otherwise, to pursue malpractice, disciplinary or any other action on behalf of Parnar against Schutter or Judge Waldorf. Indeed, this Court concludes that, under the Canon 5 of Code of Professional Responsibility, GNLJ correctly declined to undertake any such action because they would be likely witnesses on behalf of Parnar against Schutter and/or Judge Waldorf.

5. Parnar promised to pay GNLJ pursuant to the Fee Agreement. GNLJ relied on Parnar's promise to their detriment and are entitled to be paid pursuant to the Fee Agreement.

6. GNLJ's lien for the fees and costs was timely asserted and noticed to all parties and is enforceable.

7. Even if the Fee Agreement itself were for some reason not, enforceable, the Court concludes that the fees set forth in the Fee Agreement are, for purposes of determining a quantum meruit value of the services rendered by GNLJ, fair and reasonable. Parnar adduced no evidence of what a fair and reasonable fee for GNLJ's services would be. Parnar's unilateral and unsupported estimate that the fair amount of attorneys' fees would be $30,000 is without foundation and is facially unreasonable. The only expert witness testified that the fees as charged are consistent with community practice and fair. No conflicting testimony was presented.

8. The Court concludes that the assumpsit attorney fee statute is not applicable to this motion, and the Court declines to grant these additional fees, which were requested by GNLJ.

9. The Court concludes that GNLJ was entitled to be paid their fees on the amounts collected and paid into its client trust account in September 1988 as of the date those amounts were collected. Having not been so paid, GNLJ is entitled to pre-judgment interest on their unpaid fees and costs from the date the funds were received until the date of this order at the legal rate of ten percent (10%) per annum which sum shall accrue post-judgment interest from the date of the judgment filed herein at the legal rate of ten percent (10%) per annum until paid in full.

10. The Court finds that as of July 31, 1989, the total recovery due Parnar is $2,527,520.34. The costs in the case are $8,938.69. As of July 31, 1989, the net recovery due Parnar is $2,518,581.65. The Court finds that GNLJ is entitled to 40% of the net recovery of $2,518,581.65 which equals *$1,007,432.66*, plus their costs of *$8,938.69*, for a total award to GNLJ as of July 31, 1989 of *$1,016,371.35*. This per diem interest on this sum, at the

legal rate, is $278.46 which shall accrue on all or any portion of the sum due GNLJ until it is paid in full.

11. GNLJ shall be immediately entitled to partial payment of the amounts due hereunder from the funds held in GNLJ's client trust account. GNLJ shall be entitled to the balance due as follows: The remainder of the Jugment shall be paid by Defendants into GNLJ's client trust account; GNLJ shall deduct the balance due them and forward the remainder, by certified check, to Parnar; the certified check shall be sent by hand delivery in care of John A. Chanin, Esq.; upon the delivery of the certified check to Mr. Chanin's office, all obligations of Parnar and GNLJ under the Fee Agreement shall cease.

12. GNLJ is entitled to a lien in the amount set forth above upon all monies presently held in their client trust account for Parnar and on all other funds which are due and owing to Parnar in this case until the amounts due GNLJ, with interest, have been fully paid, at which time the aid lien shall cease and be of no further offset.

ORDERED this 11th day of Sept, 1989.

/s/ Hiroshi Oshiro (Seal)
JUDGE OF THE ABOVE-ENTITLED COURT

I do hereby certify that this is a full, true, and correct copy of the original on file in this office.

/s/ N. Anaya
Clerk, Circuit Court, First Circuit

APPENDIX B

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

CIVIL NO. 52878

NOTICE OF LIEN; CERTIFICATE OF SERVICE

1ST CIRCUIT COURT STATE OF HAWAII
FILED

1991 JAN 30 P 3:12

N. ANAYA
CLERK

EUGENIE PARNAR,

Plaintiff,

vs.

AMERICANA HOTELS, INC., FLAGSHIP INTERNATIONAL, INC., MARK E. LIQUORI, JOHN DOES 1-25, JANE DOES 1-25, DOE CORPORATIONS 1-25, DOE PARTNERSHIPS 1-25,

Defendants.

Of Counsel:
THE LAW OFFICES OF JOHN A. CHANIN

JOHN A. CHANIN 650
JAMES Y. AGENA 3385
KEITH Y. YAMADA 4044
Four South King Street
Honolulu, Hawaii 96813
Telephone No. 538-1165

NOTICE OF LIEN

THE LAW OFFICES OF JOHN A. CHANIN, hereby gives notice to all parties concerned that it has a lien on funds

recovered in the above-entitled action by Plaintiff, for legal services rendered to the Plaintiff in this action, and for disbursements made and costs incurred for Plaintiff herein as set forth below.

The lien secures payment of the following amounts:

Attorneys' fees and costs in the amount of $24,431.88, plus interest, costs and reasonable attorneys' fees as permitted by law and for such other and further relief as this Court deems just and proper in the premises.

DATED: Honolulu, Hawaii, January 30, 1991 .

/s/ Reed Clausen
JOHN A. CHANIN
KEITH Y. YAMADA
Attorneys for Plaintiff
EUGENIE PARNAR

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

APPENDIX C

[SEC. VIB OF PETITIONER'S OPENING BRIEF, HAWAII SUPREME COURT]

* * *

B. ATTORNEYS' FEES DISPUTES UNDER CONTINGENT FEE CONTRACTS ARE LEGAL ACTIONS, AND THE CLIENT IS ENTITLED TO A JURY TRIAL NOTWITHSTANDING THE FACT THAT THE LAWYER REQUESTS RELIEF THROUGH AN EQUITABLE REMEDY, SUCH AS ENFORCEMENT OF AN ATTORNEY'S LIEN.

The Seventh Amendment to the U. S. Constitution provides that:

> [i]n [s]uits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the common law.

The U. S. Supreme Court has ruled, however, that the Seventh Amendment "does not in any manner whatever govern or regulate trials by jury in state courts.'" *Minneapolis & St. Louis R. R. v. Bombolis*, 241 U.S. 211, 217 (1916); *see also, Melancon v. McKeithen*, 345 F.Supp. 1025, 1045 (1972), *aff'd sub nom., Hill v. McKeithen*, 409 U.S. 942 (1972) ("a civil jury trial is not so implicit in the concept of ordered liberty in a cooperative federalism as to be required of the states by due process"); *Harada v. Burns*, 50 Haw. 528, 532, 445 P.2d 376 (1968) ("[t]he seventh amendment jury trial requirement is not binding upon the states").

This Court has ruled that, "[w]e then must turn to the state constitutional provision and the statutes and rules implementing it" to determine when the right to jury trial

attaches in a civil case. *Lum v. Sum*, 70 Haw. ___, 769, P.2d 1091, 1095 (1989). Article I, Section 13 of the Hawaii Constitution provides a right to a jury trial:

> [i]n suits at common law where the value in controversy shall exceed five thousand dollars[.]

HRS Section 635-13 provides that, "[w]hen the right of trial by jury is given by the Constitution or a statute of the United States or this State and the right has not been waived, the case shall be tried with a jury." Finally, *HRCP* Rule 38(a) declares:

> The right of trial by jury as given by the Constitution or a statute of the State or the United States shall be preserved to the parties inviolate.

Harada v. Burns, 50 Haw. 428, 445 P.2d 376 (1968), notes that:

> since the Hawaii constitutional provision and rule of procedure were patterned after the Federal Constitution and Rules, the interpretation of those provisions by the federal courts are deemed to be highly persuasive in the reasoning of this court.

50 Haw. at 532. The U. S. Supreme Court addressed jury trials in attorneys' fee disputes under contingent fee contracts in *Simler v. Conner*, 372 U.S. 221 (1963). In *Simler* the trial court rejected a jury trial demand holding that an action for attorneys' fees was "equitable" and not "legal" in character. 372 U.S. at 222. The Supreme Court reversed, concluding a declaratory action for attorneys' fees was "legal in character." 372 U. S. at 223. The *Simler* court ruled:

> The record discloses that the controversy between petitioner and respondent in substance involves the amount of fees petitioner, a client, is obligated to pay respondent, his lawyer.

> Petitioner admits his obligation to pay a "reasonable" fee under a contingent fee retainer contract stipulating that reasonableness may be set in a court trial. Respondent relies on a subsequent contract specifying 50% of the recovery, under certain circumstances, as the amount for the fee. Petitioner counters that the latter contract is the product of fraud and overreaching by the lawyer.

372 U.S. at 223. "The case was in its basic character a suit to determine and adjudicate the amount of fees owing to a lawyer by a client under a contingent fee retainer contract," said the Court, which is a traditionally "legal" action. *Id.* Finally:

> The questions involved are traditional common-law issues which can and should have been submitted to a jury under appropriate instructions as petitioner requested.

372 U.S. at 223; *see also, Sarkeys v. Haas*, 402 P.2d 894, 899 (Okla. 1965) ("[in] an action brought for attorneys' fees, the issue as to what would be a reasonable fee for services rendered is an issue of fact to be determined by the jury"); *Neal v. Drainage District No. 2*, 248 P. 22, 24 (Idaho 1926) ("[t]he court erred in denying the appellant a jury trial and for this reason the cause must be reversed"); *Taylor v. Barnhill*, 470 P.2d 902, 904 (Colo. 1970) ("the burden is upon the attorneys to prove that the arrangements were fairly and openly arrived at and to prove the reasonable value of the services rendered [which] are questions of fact to be determined by the jury"); *Jacobs v. United Electric Rys. Co.*, 125 A. 286, 288 (R.I. 1924) ("[t]he question of whether the plaintiff has a contract with Mrs. Coreira was for the jury to decide on the conflicting testimony, and not for the trial justice"); *Milton Kelner v. 610 Lincoln Road, Inc.*, 328 So.2d 193, 195 (Fla. 1976) ([t]hat issue was submitted to the jury"); *Wolfe v.*

Campbell, 320 P. 506, 506 (Okla. 1924) ("[i]n an action for a specific attorneys' fees, were issued is joined as to what is a reasonable fee, such issue is for the jury, notwithstanding the plaintiff may pray that an equitable lien be decreed against defendant's land").

Nor did GNLJ's request for equitable relief in the form of an attorneys' lien alter the application of the jury trial right in this case. The issues joined at the July, 1989 hearings focused on the reasonableness of the fees and the legality of the fee contract. These were legal issues, triable before a jury.

In *Jarman v. Hale*, 731 P.2d 813 (Idaho 1986), the Idaho Supreme Court cited *Simler v. Conner, supra*, and concluded "[t]he Hales were entitled to have these disputed issues of fact determined by a jury," despite encountering these issues in a lien enforcement action:

> The Idaho Supreme Court in *Neal v. Drainage District No. 2*, 42 Idaho 624, 248 P. 22 (1926), held that under article I, section 7 of the idaho Constitution, a defendant has a right to a jury in an action to recover attorney fees. Similarly, the United States Supreme Court held that "a suit to determine and adjudicate the amount of fees owing to a lawyer by a client" is a legal action presenting issues to be submitted to a jury. *Simler v. Conner*, 372 U.S. 221, 223, 83 S.Ct. 609, 611, 9 L.Ed.2d 691 (1963). *Accord Taylor v. Barnhill*, 470 P.2d 902 (Colo.Ct.App. 1970); *Sarkeys v. Haas*, 402 P.2d 894 (Okla. 1965). The record before us presents a factual dispute over terms of the parties' agreement as to whether fees have been earned and properly billed. The Hales are entitled to have these disputed issues of fact determined by a jury.

731 P.2d at 818. "However," said the *Jarman* court, "separate issues are posed by a charging lien of an attorney

that are equitable in nature and triable to the court." *Id.* The *Jarman* court remanded for jury trial on the issues surrounding the terms of the fee agreement and the reasonableness of the fees, and a court hearing on the charging lien.

Jury trials for joint legal and equitable claims are discussed by Professor Moore in is annotations on the federal jury trial rule, *Federal Rules of Civil Procedure* Rule 38(a):

> There is no waiver of the right to jury trial on the legal issues by virtue of the presence of equitable issues; the legal issues are for the jury, if timely demand therefore is made, otherwise they are for the court along with the equitable issues.

5 *Moore's Federal Practice*, Section 38.11[6]. Moore observes:

> a claim basically legal does not lose its character as such because it is joined to a claim for equitable relief or brought as a counterclaim, crossclaim or third party claim in an action in which the main claim is equitable in nature. The question is still, then, whether the plaintiff's claim is basically legal or equitable or whether legal or equitable claims have been joined. If legal there is a right to a jury trial on timely demand.

5 *Moore's Federal Practice*, Section 38.16[4]. Hawaii decisions are in accord: *see e.g., Board of Directors v. Regency Tower Venture*, 2 Haw.App. 506, 513, 635 P.2d 244 (1981) ("where both legal and equitable issues are presented in a single case, only under the most imperative circumstances . . . can the right to a jury trial of legal issues be lost through prior determination of equitable claims"); *Assn. of Apt. Owners of Magellan v. Sequito*, 6 Haw.App. 284, 288, 719 P.2d 746 (1986) ("a claim that would otherwise be triable to a jury must be so tried even though it may be

thought 'incidental' to a claim for an injunction"); *Harada v. Burns*, 50 Haw. 528, 536, 445 P.2d 376 (1968) ("[i]f any common issue as between the equitable claim and *any* legal claim is to be determined first by a jury in order to preserve the right to a jury trial as to that legal issue, then *a fortiorari* if the issues are not common, the legal issues should be determined by a jury and not be foreclosed by a determination of a judge on those issues").

Finally, in 1944 this Court concluded that the question of the reasonableness of attorneys fees is for a jury:

> The plaintiff's testimony tended to show that the whole matter was fully explained to the defendant and that she signed the [agreement] with full knowledge of the words. On the other hand, the defendant's testimony tended to show that the [agreement] was not explained to her and that she did not know what she was signing. In this state of the evidence *the question of whether there was an account stated should have been left to the jury*.

Russell v. Makainai, 31 Haw. 599, 600 (1944) (emphasis added).

* * *